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No. 82-725

In the Supreme Court of the United States

OCTOBER TERM, 1982

KAARE GILBOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether transfer of funds by wire constitutes "transportat[ion of] * * * securities or money" within the proscription of 18 U.S.C. 2314.

2. Whether venue was properly laid in the Southern District of New York, where acts constituting an integral part of the offenses charged took place in that district.

3. Whether the admission of evidence of petitioner's involvement in an elaborate commercial fraud scheme similar in design to that charged in the indictment was improper under Fed. R. Evid. 404(b), where petitioner conceded that the acts charged took place but claimed he was an innocent participant.

4. Whether the district court lacked jurisdiction over the offenses charged in the indictment under principles of international law governing extraterritorial jurisdiction of nations even though acts constituting an integral part of those offenses took place in the United States.

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OPINION BELOW

The opinion of the court of appeals is reported at 684 F.2d 235.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1982. A petition for rehearing was denied on August 24, 1982. The petition for a writ of certiorari was filed on October 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all eight counts of an indictment charging wire fraud, in violation of 18 U.S.C. 1343, and transportation in interstate and foreign commerce of funds obtained by

fraud, in violation of 18 U.S.C. 2314.[1] He was sentenced to a total of 20 years' imprisonment and fined a total of $43,000 on seven of the counts. Petitioner's sentence on the remaining count was suspended and a five-year term of probation commencing upon his release from prison imposed; a special condition of probation is the payment of restitution to the victims of petitioner's fraudulent scheme. The court of appeals affirmed (Pet. App. 1a-8a).

Petitioner's convictions arose out of an elaborate fraudulent scheme perpetrated upon the international shipping industry by petitioner in 1978-1979, and repeated in 1980. The facts relating to the earlier transactions are as follows: In late 1978, petitioner was general manager of Bundo Lines, a Hong Kong ship brokerage firm. Falsely claiming to represent a shipowner, petitioner contracted with China National Chartering Corporation, a company owned by the People's Republic of China, to transport grain from Argentina to China on three ships that did not in fact exist. After that deal had been made, petitioner obtained the ships necessary to perform the contract through negotiations conducted by telephone and telex with the Manhattan office of a shipowner. In February 1979, as required by its contract with Bundo Lines, the Chinese corporation paid petitioner partial freight charges of $617,064.49 in respect of a shipment of grain loaded upon the first of these vessels,

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[1]Counts One and Two charged petitioner and James Lam with wire fraud, in violation of 18 U.S.C. 1343, and with interstate and international transportation of money and securities obtained by fraud, in violation of 18 U.S.C. 2314, based on transactions completed in 1979. Counts Three through Five charged petitioner and Richard Cunningham with wire fraud, and Counts Six through Eight charged petitioner and Cunningham with interstate and international transportation of money and securities obtained by fraud, based on separate transactions that occurred in 1980. Neither Lam nor Cunningham has been apprehended for trial.

the *Kanishka*. By its contract with the shipowner, Bundo was then required immediately to transfer this remittance to the latter. Petitioner made no such payment. Instead, using a New York City branch of Barclays Bank International, petitioner arranged for most of the funds he had received to be transferred to a bank in the Bahamas to the credit of an untraceable firm called Commonwealth Brokers, Ltd. Bundo never paid the *Kanishka's* owners any of the money due them under the contract.[2] Moreover, China National Chartering Corp. was forced to pay the owners of the *Kanishka* $360,000 in additional charges in order to avoid the shipowner's lien on the grain.[3] (Tr. 66-70, 72, 75, 81, 89-91, 100-103, 109-110, 115-116, 128-130, 137, 139-141, 148-150, 166-167, 207-208, 383-384, 647; GX 10-13, 50-53.)

The remaining vessels chartered by Bundo to fulfill its contract with China National were the *Costanza M* and the *Aiolos*. These vessels, too, took on grain and set sail for China. On February 10, 1979, China National paid freight charges of $637,003.50 to Bundo Lines in respect of the shipment on the *Costanza M*. Once again, Bundo Lines never made payment to the vessel's owners; China National was obliged to pay additional freight directly to the owners of the *Costanza M* to secure release of her cargo of grain. China National also paid Bundo freight charges in respect of the *Aiolos*, but it was able to stop payment before that transfer of funds was completed, ultimately paying the

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[2]The shipping firm was able to arrest a bank account belonging to Bundo. After litigation, the shipping firm received between $40,000 and $50,000 from that account.

[3]Including its payment to petitioner of $617,069.49, the Chinese Company thus paid out more than $242,000 in excess of its total contractual liability to Bundo for freight.

freight charges directly to the vessel's owners (Tr. 81-83, 91-92, 242, 246-248).[4]

In 1980, petitioner again swindled a commercial instrumentality of the People's Republic of China, employing an artifice similar to that previously employed. This time petitioner operated out of the offices of a Japanese ship brokerage firm, Tokyo Freighting. Falsely claiming to represent a Taiwanese shipowner and operating through a London ship broker as intermediary, he secured contracts from the Chinese to transport grain from the United States to China on three ships. Then, falsely claiming to represent a Hong Kong shipping firm, petitioner chartered the three vessels needed to perform the grain delivery contracts from another ship broker, Tokyo Chartering. In late August 1980, the Chinese company paid almost three million dollars as partial freight charges for the three grain shipments. Pursuant to petitioner's instructions, payment was made to the New York City office of a foreign bank. Several interbank transfers were then made involving domestic and foreign banks in New York. The funds were then transferred to the Channel Islands, back to the Chase Manhattan Bank in New York, and ultimately to the account of Numan Construction and Development Co. with the Chase Manhattan Bank in Nassau, Bahamas. Numan had the same address as Commonwealth Brokers, Ltd., the recipient of the freight charges in the *Kanishka* transaction. The owners of the ships that delivered the grain never received any portion of these funds. The Chinese government ultimately made direct payment to the shipowners of more than $1.5

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[4]Because petitioner's fraudulent scheme failed in the case of the *Aiolos*, and because the *Costanza M* transaction could not be tied by the available evidence to the Southern District of New York, petitioner was not charged with offenses based on those transactions. See page 11, *infra*.

million to secure release of the grain (Tr. 273, 281, 301, 307-320, 335-337, 369, 393, 396, 402, 404, 412-413, 456-457, 478; GX 63-65, 71-73, 76, 79, 81, 83, 100-103, 110-112, 120-122).

Petitioner testified at his trial. He admitted his involvement in each of the foregoing transactions but claimed that in each case he was the innocent victim of others. At sentencing the district court stated (Sentencing Tr. 7):

> I listened to your testimony on the stand as a defendant. I am as confident as the jury was that it was a tissue of perjury and I make such a finding in connection with this sentencing today.

ARGUMENT

1. Petitioner first claims (Pet. 6-12) that his conduct did not violate 18 U.S.C. 2314, arguing that wire transfer of funds does not constitute transportation of money within the meaning of that statute.[5] The opinion of the court of appeals rejecting that contention (Pet. App. 5a-6a) is clearly correct, however, and does not conflict with any decision of this Court or of any other court of appeals.

The plain language of Section 2314 prohibits the "transport[ation] in * * * foreign commerce [of] any * * * securities or money of the value of $5,000 or more, knowing the same to have been * * * taken by fraud." This is precisely what petitioner accomplished by arranging for wire transfers of the funds obtained by fraud in this case. This Court has

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[5]The evidence at trial showed that $535,769.77 of the proceeds of petitioner's fraudulent transactions involving the *Kanishka*, was electronically transferred from Hang Lung Bank, Hong Kong, to Barclays Bank International, New York, and thence to Barclays Bank International, Nassau, Bahamas (GX 50, 53). The proceeds of the fraudulent transactions in 1980 were transferred telegraphically from China to New York. From there, the funds were transferred, in part by wire and in part by check, to the Channel Islands, back to New York, and ultimately to the Bahamas (GX 100).

recognized that "[t]he transporting charge does not require proof that any specific means of transporting were used." *Pereira* v. *United States*, 347 U.S. 1, 9 (1954). Moreover, one who takes steps that he knows will cause transportation of fraudulently obtained funds is liable under the statute. See *United States* v. *Sheridan*, 329 U.S. 379 (1946). Petitioner has suggested no reason why a wire transfer such as he employed in this case should not be regarded as transportation of fraudulently obtained monies.[6]

Petitioner's argument appears to rest (Pet. 8), in part, upon the premise that the funds transferred in this case did not constitute either money or securities for purposes of Section 2314. As the court of appeals noted (Pet. App. 6a n.3), there is no need to consider this contention because the district court charged the jury that the items transferred fell "within one or more of the categories of securities or

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[6]Contrary to petitioner's unsupported contention (Pet. 8), nothing in the statute requires transportation of monies by a physical medium. Nor is there anything in the legislative history material cited by petitioner (*ibid.*) that supports petitioner's contention that electronic transfers were excluded from the operation of the statute. These documents contain no reference that we can find to electronic transfers.

Nor does the enactment in 1978 of separate legislation, 15 U.S.C. (Supp. V) 1693 *et seq.*, to govern electronic fund transfers reflect a judgment by Congress that 18 U.S.C. 2314 did not cover *any* such transfers, or the particular transactions at issue here. Petitioner's contention (Pet. 10) is unsupported by any reference to pertinent legislative history. In any event, 15 U.S.C. (Supp. V) 1693a(6)(E), the pertinent definitional provision of the 1978 Act, makes clear that the Act does not govern "any transfer of funds which is initiated by a telephone conversation between a customer and an officer or employee of a [bank] which is not pursuant to a prearranged plan and under which periodic or recurring transfers are not contemplated." Moreover, the criminal provisions of the 1978 Act, 15 U.S.C. (Supp. V) 1693n, apply to acts such as fraudulent use of a card or device used to secure cash from an automatic teller machine, or such use of a card that permits debiting of a customer's bank account for retail purchases. Thus the 1978 Act was not intended to cover petitioner's one time transaction—an old-fashioned fraud that made incidental use of modern technology.

moneys," and petitioner made no objection to this instruction. In any event, petitioner's contention is unsound. Petitioner does not even attempt to explain why his transfers did not involve "money" within the meaning of Section 2314,[7] and we are aware of no basis for any such contention. There is thus no need to explore whether the transfers also involved "securities" within the meaning of Section 2314.

For the foregoing reasons, petitioner's conduct proven at trial was that proscribed by the plain language of Section 2314. Petitioner's novel contention (Pet. 6) that the court of appeals' decision so holding "constitutes ex post facto legislation" and works a denial of due process accordingly requires no further response.[8]

2. Petitioner next claims (Pet. 13-17) that venue was improperly laid in the Southern District of New York. At the outset we note that petitioner raised this claim for the first time in the court of appeals. In specifying grounds for his motion for acquittal at the close of the government's case petitioner made no mention of venue, even though the factual basis for his claim was apparent, at the latest, at that juncture. Petitioner's objection to venue was accordingly waived. *United States* v. *Menendez*, 612 F.2d 51, 54-55 (2d Cir. 1979); *Gilbert* v. *United States*, 359 F.2d 285, 288 (9th

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[7]Although not explicitly so labelled, petitioner's argument (Pet. 8) addresses the meaning of only the term "securities" in Section 2314.

[8]Petitioner's contention (Pet. 11), citing *Pereira* v. *United States*, *supra*, that his conviction of offenses under both 18 U.S.C. 1343 and 18 U.S.C. 2314 violates the rule of *Blockburger* v. *United States*, 284 U.S. 299 (1932), is not properly presented in this Court because it was not raised below. In any event, the contention is unsound. Indeed this Court's decision in *Pereira* rejects just such a claim. 347 U.S. at 9.

Cir.), cert. denied, 385 U.S. 882 (1966).[9] Petitioner's contention is, in any event, without merit.

Petitioner's claim is that pursuant to 18 U.S.C. 3238 venue was proper only in Connecticut, the district where he was arrested.[10] The court of appeals correctly rejected this contention (Pet. App. 7a-8a), observing that Section 3238 applies only to offenses not committed in any judicial district, whereas petitioner's offense was committed, at least in part, in the Southern District of New York, through which the proceeds of the frauds were transferred and various communications essential to their accomplishment were made. The court stressed that the proceeds of the fraud in

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[9]The court of appeals stated (Pet. App. 7a) that "there is a real question whether defendant adequately raised th[is] issue below." In the court of appeals petitioner claimed (Br. 14-15) that he had raised his venue objection in his motion for a judgment of acquittal. The trial transcript (Tr. 498) reflects, however, that petitioner raised only a claim of lack of jurisdiction (see pages 14-16, *infra*). The court of appeals accordingly remarked (Pet. App. 7a) that "[t]he record indicates that defense counsel focused on jurisdiction rather than on venue in making his motion." The court of appeals nevertheless reached the merits of the venue issue, accepting, arguendo, "the dubious assumption that defendant properly challenged venue at trial" (Pet. App. 7a).

In this Court petitioner has pointed to nothing in the record to support that assumption. We note that petitioner has not identified any respect in which he was prejudiced by the location of his trial.

[10]18 U.S.C. 3238 provides:

Offenses not committed in any district

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

question had moved "from, through, or into" the Southern District of New York. The court of appeals accordingly concluded that all of the offenses were prosecutable in that location under 18 U.S.C. 3237(a).[11]

Petitioner's contention rests upon the peculiar theory (Pet. 14-17) that Section 3238 provides the exclusive basis for venue as to any offense begun outside the United States even though the offense involves foreign commerce that passes through a judicial district of the United States and is accordingly, under the plain language of Section 3237(a), prosecutable in that district—here, the Southern District of New York.[12] Petitioner adduces no relevant support for this novel contention. Even if the petitioner were correct in suggesting (Pet. 15) that the disjunctive reference in Section 3238 to offenses "begun *or* committed" outside any district renders it applicable to offenses such as his, that are begun outside the United States, but also committed in part in some judicial district, the second paragraph of Section

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[11]Section 3237(a) provides (emphasis added):

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted *in any district from, through, or into which such commerce or mail matter moves.*

[12]Petitioner's suggestion (Pet. 14) that the court of appeals considered only the title of Section 3238 and not its language is simply untrue.

3237(a) plainly provided an alternative venue in the Southern District of New York.[13]

3. Petitioner next contends (Pet. 17-20) that the district court admitted evidence of petitioner's criminal acts similar to those with which he was actually charged contrary to Fed. R. Evid. 404(b). More specifically, petitioner claims that the district court allowed admission of such evidence as part of the government's case in chief, rather than awaiting rebuttal, in contravention of prevailing Second Circuit authority. These claims are without merit.

a. Rule 404(b) permits the admission of "other crimes" evidence for purposes including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The courts of appeals have consistently held that extrinsic crime evidence may be admitted under Rule 404(b) if (1) the evidence proffered is relevant to an issue disputed at trial other than the defendant's character, and (2) the probative value of the evidence is not substantially outweighed by the risk of unfair prejudice. See, e.g., *United States* v. *Reed*, 639 F.2d 896 (2d Cir. 1981), and cases cited therein; *United States* v. *Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440

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[13]Petitioner's reliance (Pet. 15) upon *United States* v. *Castillo-Felix*, 539 F.2d 9, 13 (9th Cir. 1976), is doubly misplaced because the court of appeals did not decide in that case whether venue rested upon 18 U.S.C. 3238 or Fed. R. Crim. P. 18; a fortiori the Ninth Circuit did not suggest that Section 3238 prescribed an exclusive venue where an offense begins outside the United States. *United States* v. *Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979), and *United States* v. *Williams*, 589 F.2d 210, 212-213 (5th Cir. 1979), on rehearing *en banc*, 617 F.2d 1063 (5th Cir. 1980), cited by petitioner (Pet. 16), clearly recognize that where applicable Section 3238 may provide a venue alternative to that prescribed by Section 3237(a). Finally, *United States* v. *Beliard*, 618 F.2d 886, 887 (1st Cir. 1980), cited by petitioner (Pet. 15), suggests that venue is proper under 18 U.S.C. 3237 as well as 18 U.S.C. 3238 where an offense is begun outside the United States.

U.S. 920 (1979). Here, the district court held a hearing outside of the presence of the jury and determined that the similar act evidence proffered by the government met these criteria. Further review by this Court of this essentially fact-based claim is unnecessary.

The "other crimes" evidence in question has two aspects. First is evidence pertaining to petitioner's defalcations involving the *Constanza M* and the *Aiolos* (see pages 3-4, *supra*). Although petitioner's fraud respecting the latter ships was not directly the subject of the prosecution (see page 4 note 4, *supra*), it was, as petitioner recognizes (Pet. 18), intimately related to his fraud involving the *Kanishka*. Indeed the evidence pertaining to the *Costanza M* and the *Aiolos* is largely inseparable from the evidence pertaining to the *Kanishka*, and admission of any non-overlapping evidence merely gave the jury a coherent account of what was plainly a single fraudulent scheme. See *United States* v. *Cohen*, 516 F.2d 1358, 1366 (8th Cir. 1975). Petitioner has cited no authority excluding "other crimes" evidence in these circumstances, where the "other" crimes are merely acts in furtherance of a single criminal scheme.

There was also similar act evidence at trial concerning petitioner's role in chartering three ships to Philippine National Lines in 1977. The evidence showed that in 1977 petitioner, claiming falsely that he represented shipowners, secured contracts to carry cargo from the United States to the Philippines for Philippines National Lines. In 1977, as in the later transactions, petitioner instructed the charterer to pay into a particular bank account the freight that was due when the ships loaded their cargo. And as in the later schemes, Philippines National Lines paid the money to the account specified by petitioner, but the actual shipowners never received the funds, and the money disappeared to the Bahamas (Tr. 420-434). Because the Philippine National

Lines scheme involved a different ship brokerage firm and different victims from those in the crimes with which he was actually charged, and because the former incident antedated the others by a year, petitioner contends that there is no basis for its admission under Rule 404(b). Evidence bearing upon the 1977 incident was properly admitted, however, because of the light it shed on petitioner's claim that he was the innocent victim of others in each of the fraudulent transactions.

Prior to trial, the government submitted a memorandum of law describing the other crimes evidence it planned to introduce, arguing that the evidence was relevant to the issue of common scheme or plan and also to the issue of knowledge and intent (C.A. App. 12-18).[14] The subject was raised at a pretrial conference, and petitioner's counsel was invited to respond (C.A. App. 25-29). Petitioner's counsel never argued that the transactions charged in the indictment did not take place or that petitioner had not participated in them; rather, he conceded that the issue in the case was whether petitioner had devised a fraudulent scheme, or whether he was simply an innocent victim (Gov't. Br. App. 1a-2a).[15] In view of the adoption of this line of defense, it was appropriate for the government to offer the evidence of similar and related transactions, which evidence contradicted petitioner's claim that he lacked intent to defraud.[16]

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[14]"C.A. App." denotes the joint appendix filed in the court of appeals.

[15]"Gov't. Br. App." denotes the appendix to the government's brief in the court of appeals, which reproduces the pertinent transcript.

[16]The district court admitted the evidence (Gov't. Br. App. 1a). The court instructed the jury that the similar act evidence could be considered only on the issue of petitioner's knowledge and intent, and on the question of whether the crimes charged were part of a common scheme or plan (Tr. 869-870).

b. Petitioner contends (Pet. 18-20) that admission of similar crimes evidence as part of the government's case in chief was, in any event, contrary to established Second Circuit precedent. Preliminarily, we note that even if founded, this claim, based upon application of circuit precedents, would not warrant this Court's review.[17] Moreover, in view of the strict guidance that the Second Circuit has provided respecting administration of Rule 404(b) (see Pet. 18-19), the court's fact-bound determination that admission of the other crimes evidence was, in the circumstances of this case, a proper part of the government's case in chief is of no precedential value or general importance.[18]

In any event, there was no error here, for the pretrial proceedings made perfectly clear that petitioner's defense would be that he lacked intent to defraud. There accordingly was no need to await the defense case to see if such an issue arose. Compare *United States* v. *Figueroa*, 618 F.2d 934, 939 n.1 (2d Cir. 1980). And petitioner suffered no prejudice as a result of the district court's determination that intent was to be an issue at trial, for that determination proved correct. Petitioner testified at trial that he was victimized by one Michael Rogers in the *Kanishka* transaction, by a Charles R. Hardy in the 1980 transaction, and by a John Baldwin in the 1977 Philippine National Lines transaction. The disputed evidence, however, showed that petitioner developed a complex, sophisticated scheme for defrauding shipowners and charters and used it to defraud the victims of all three transactions. This evidence was properly admitted to establish the manner in which he defrauded his victims.

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[17]Indeed, every decision cited by petitioner in connection with his other crimes evidence argument is a decision of the Second Circuit.

[18]The court of appeals did not address petitioner's other crimes evidence argument, except to say that it found it to be "without merit" (Pet. App. 8a).

4. Petitioner's final contention (Pet. 21-30) is that under principles of international law pertaining to *extraterritorial* jurisdiction of nations the district court lacked jurisdiction to try petitioner for the offenses charged in the indictment. This claim is without merit. Indeed, petitioner's entire argument rests upon a false premise, because the court of appeals correctly found jurisdiction as to each of the offenses charged based upon the commission of key elements of the offenses *in the United States* (Pet. App. 4a-6a).[19] Indeed, petitioner suggests no basis to question the court of appeals' determination that key acts in furtherance of each offense took place in New York.[20] Thus there is no need to follow petitioner through the intricacies of international law; he concedes (Pet. 23) that no jurisdictional question exists where jurisdiction is based upon "commission of the act within the borders of the sovereign."

Petitioner's argument appears to rest on the unarticulated theory that jurisdiction cannot rest upon acts that he caused to be committed in the United States because he was not physically present in the United States (see Pet. 23-25). But petitioner cites no authority for this remarkable premise, and it is plainly unsound. See, e.g., *United States* v. *Columba-Colella*, 604 F.2d 356, 359 (5th Cir. 1979). Because the jurisdiction of the United States to prosecute petitioner rests upon acts he caused to be committed in the

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[19]Petitioner simply ignores the holding of the court of appeals. See, e.g., Pet. 22 n.1, distinguishing *United States* v. *Davis*, 608 F.2d 555, 557 (5th Cir. 1979), on the ground that the case involved acts done inside the United States.

[20]As to the wire fraud counts (see page 2 note 1, *supra*), the court of appeals pointed to telephone and telex communications to and from New York used to arrange chartering of the ship employed in the 1978-1979 transactions, and the transfer of the proceeds of the 1980 fraudulent transaction. As to the transportation counts, the court stressed that the actual transfers of funds had, by petitioner's arrangement, occurred through New York (Pet. App. 4a-6a).

United States, there is no need to consider whether the acts petitioner committed had sufficient detrimental effects upon the United States to supply an independent basis for prosecution under the "objective territorial" principle of international law (see Pet. 24-25).[21] Rather, it is for Congress to decide whether the exploitation of United States channels of commerce and communication for illegal purposes is sufficiently harmful to national interests to warrant prosecution under our laws. *United States* v. *Davis, supra*, 608 F.2d at 557.

Petitioner's assertion (Pet. 21) that the decision below conflicts with the Fifth Circuit's decision in *United States* v. *Columba-Colella, supra*, is unfounded. In that case, a British citizen residing in Mexico, agreed to sell a car, stolen in the United States. He was indicted for receiving stolen goods. The defendant had no part in the original theft of the car in the United States; he had simply negotiated in Mexico with the thief to purchase the car. Thus, unlike the present case, in *Columba-Colella* no part of the defendant's crime took place in the United States. Moreover, the Fifth Circuit made clear that if the defendant's intent had included the theft of the car, United States jurisdiction could have been asserted. 604 F.2d at 359. Here, of course, essential elements of petitioner's crime, the use of wires located in the United States to defraud his victims and

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[21]Contrary to the impression that might be garnered from the petition, the court below did not rely upon or discuss this basis for jurisdiction. The quotation from Second Circuit authority found at page 25 of the petition is from another case, *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir. 1968); *Pizzarusso* was not cited in the decision of the court below in this case.

transportation of the proceeds of his fraud in interstate and foreign commerce, occurred within the United States.[22]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983

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[22]Because petitioner's prosecution rests upon acts committed in the United States, the "policy considerations" that he adduces against a finding of extraterritorial jurisdiction (Pet. 29-30) are simply irrelevant. In any event, we note the following: (1) the corporation that owned the ships and was defrauded in the 1978-79 transaction had offices in New York (Tr. 137) from which it negotiated the transaction; (2) there is no support in the record for petitioner's claim (Pet. 30) that that corporation or its subsidiary sought to avoid United States laws and that the 1978-79 transaction was deliberately structured to avoid the application of United States law; (3) similarly without support in the record is the claim (*ibid.*) that Britain and Japan, after conducting investigations, concluded that there were inadequate grounds for prosecution.

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